

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

----In the Matter of---- )  
 )  
PUBLIC UTILITIES COMMISSION ) DOCKET NO. 2013-0168  
 )  
Opening a Proceeding to Review )  
the Progress of Castle & Cooke )  
Properties, Inc.'s Proposed Lanai )  
Wind Project. )  
\_\_\_\_\_ )

ORDER NO. 31765

DENYING WITHOUT PREJUDICE THE MOTIONS TO DISQUALIFY  
THE YAMAMOTO CALIBOSO LAW FIRM FROM  
REPRESENTING CASTLE & COOKE PROPERTIES, INC.

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PUBLIC UTILITIES  
COMMISSION

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DENYING WITHOUT PREJUDICE THE MOTIONS TO DISQUALIFY  
THE YAMAMOTO CALIBOSO LAW FIRM FROM  
REPRESENTING CASTLE & COOKE PROPERTIES, INC.

By this Order,<sup>1</sup> the commission denies without prejudice the motions to disqualify the Yamamoto Caliboso law firm from representing Castle & Cooke Properties, Inc., in the subject proceeding.

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<sup>1</sup>The Parties are: (1) HAWAIIAN ELECTRIC COMPANY, INC. ("HECO"); (2) CASTLE AND COOKE PROPERTIES, INC.; (3) the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party, pursuant to Hawaii Revised Statutes § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a); (4) LIFE OF THE LAND; (5) NEXTERA ENERGY HAWAII, LLC; (6) FRIENDS OF LANAI; (7) HAWAII INTERISLAND CABLE LLC; (8) RENEWABLE ENERGY ACTION COALITION OF HAWAII, INC.; and (9) KAULANA KAHO'OHALAHALA and MATTHEW MANO.

I.

Background

Carlito P. Caliboso, Esq., previously served as Chairman of the commission from April 2003 until March 2011, and as a Commissioner from March 2011 to August 2011.<sup>2</sup> Mr. Caliboso is presently an attorney with the Yamamoto Caliboso law firm.<sup>3</sup>

On July 11, 2013, the commission: (1) initiated this investigative proceeding to review the status of the Lanai Wind Project; (2) named HECO, Castle and Cooke Resorts, LLC, and the Consumer Advocate as parties; and (3) instructed Castle & Cooke Resorts, LLC to file a written statement.<sup>4</sup>

On July 22, 2013, Mr. Caliboso and his client, Castle & Cooke Properties, Inc., informed the commission that: (1) Castle & Cooke Properties, Inc., is the developer of the Lanai Wind Project, in cooperation with its corporate parent, Castle & Cooke, Inc.; and (2) the Yamamoto Caliboso law firm represents Castle & Cooke Properties, Inc. Accordingly, Castle & Cooke Properties, Inc., requested that it

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<sup>2</sup>Letter from Chair Hermina Morita to Mr. Caliboso, dated August 15, 2013, at 6.

<sup>3</sup>See, e.g., letter from Mr. Caliboso to Chair Morita, dated August 22, 2013.

<sup>4</sup>Order No. 31355, Initiating Proceeding, filed on July 11, 2013 ("Order No. 31355").

be named as the party in interest in place of Castle & Cooke Resorts, LLC.<sup>5</sup>

Subsequently, on July 29, 2013, the commission: (1) named Castle & Cooke Properties, Inc., as a party; and (2) dismissed Castle & Cooke Resorts, LLC, as a party.<sup>6</sup>

By letter dated August 15, 2013, commission Chair Hermina Morita instructed Mr. Caliboso to provide, pursuant to HAR § 6-61-13(b), written proof of his authority and qualifications to act as legal counsel for Castle & Cooke Properties, Inc., including his compliance with the Hawaii Rules of Professional Conduct ("HRPC").<sup>7</sup>

By reply letter dated August 22, 2013, Mr. Caliboso informed Chair Morita that he was in compliance with and not in violation of the applicable rules of the HRPC. Nevertheless, Mr. Caliboso further stated that he was recusing himself from participating in the subject proceeding, the other attorneys in his law firm will continue to represent Castle & Cooke Properties, Inc., and he "will be screened from

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<sup>5</sup>Mr. Caliboso's and Castle & Cooke Properties, Inc.'s letters, dated July 19, 2013, filed on July 22, 2013.

<sup>6</sup>Order No. 31380, Naming Castle & Cooke Properties, Inc. as a Party and Dismissing Castle & Cooke Resorts, LLC (nka Lanai Resorts, LLC) as a Party, filed on July 29, 2013 ("Order No. 31380").

<sup>7</sup>Letter from Chair Morita to Mr. Caliboso, dated August 15, 2013.

any participation in this matter and will be apportioned no part of the fee therefrom, as provided in HRPC 1.11(a)."<sup>8</sup>

Subsequently, on September 18, 2013, the commission: (1) dismissed without prejudice the motion to disqualify the Yamamoto Caliboso law firm filed on August 23, 2013 by Kaulana Kaho`ohalahala and Matthew Mano, and the joinder thereto, filed on August 28, 2013 by Friends of Lanai; and (2) set an October 4, 2013 deadline date for any of the parties (other than Castle & Cooke Properties, Inc.) to file or re-file any motions to disqualify the Yamamoto Caliboso law firm.<sup>9</sup>

On October 2, 2013, Friends of Lanai filed a motion to disqualify. On October 3, 2013, Life of the Land filed written comments in lieu of a motion to disqualify. On October 4, 2013: (1) Kaulana Kaho`ohalahala and Matthew Mano filed a motion to disqualify; and (2) the Consumer Advocate filed its statement of no position in response to Friends of Lanai's motion to disqualify.

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<sup>8</sup>Letter from Mr. Caliboso to Chair Morita, dated August 22, 2013, at 2.

<sup>9</sup>Order No. 31451, (1) Dismissing Without Prejudice: (A) Kaulana Kaho`ohalahala and Matthew Mano's Motion to Disqualify; and (B) Friends of Lanai's Joinder in the Motion to Disqualify; and (2) Establishing a Deadline Date to File or Re-File any Motions to Disqualify, filed on September 18, 2013.

Thereafter, on October 8, 2013, the Consumer Advocate filed its statement of no position in response to Kaulana Kaho`ohalahala and Matthew Mano's motion to disqualify, and on October 9, 2013, NextEra Energy Hawaii, LLC, filed its statement of no position in response to both motions and Life of the Land's written comments.

On October 11, 2013, Castle & Cooke Properties, Inc., filed its: (1) memoranda in opposition to the motions to disqualify; and (2) response to Life of the Land's written comments.

## II.

### Discussion

HAR § 6-61-13 states:

§6-61-13 Code of ethics. (a) Any person who signs a pleading, brief, or document, enters an appearance at a hearing, or transacts business with the commission, by that act represents the following:

- (1) That the person is lawfully authorized and qualified to so act;
- (2) That the person will comply with the laws of this State and the several counties, and the rules of this commission; and
- (3) That the person will maintain the respect due to the commission and will not deceive or knowingly present any false statements of fact or law to the commission.

(b) The commission may at any time require any person appearing before the commission in a representative capacity to furnish proof of authorization and qualification to act in that capacity.

HAR § 6-61-13.

The HRPC prescribes an attorney's professional responsibility and governs the legal profession.

The 2013 version of Rules 1.11 and 1.12 of the HRPC states in part:

**Rule 1.11.SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT.**

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or

continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

. . . .

(d) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

#### **Rule 1.12.FORMER JUDGE OR ARBITRATOR.**

(a) A lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in



which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

HRPC Rules 1.11 and 1.12.

Effective January 1, 2014, Rules 1.11 and 1.12 of the HRPC will state in part:

**Rule 1.11.SPECIAL CONFLICTS OF INTEREST FOR FORMER  
AND CURRENT GOVERNMENT OFFICERS AND  
EMPLOYEES.**

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its consent to the representation, confirmed in writing after consultation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee:

. . . .

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

**Rule 1.12.FORMER JUDGE, ARBITRATOR, MEDIATOR, OR  
OTHER THIRD-PARTY NEUTRAL.**

(a) A lawyer shall not represent anyone in the same or substantially related matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding consent after disclosure, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator, mediator, or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

See Supreme Court of the State of Hawaii, In re Hawai'i Rules of Professional Conduct, SCRU-11-1047, Order Amending the Hawai'i Rules of Professional Conduct, filed June 25, 2013 (HRPC Rules 1.11 and 1.12, effective January 1, 2014).

Friends of Lanai, Kaulana Kaho'ohalahala, and Matthew Mano (collectively, "Movants") contend that Mr. Caliboso's voluntary recusal from representing Castle & Cooke Properties, Inc., in this proceeding must be followed by the disqualification of the Yamamoto Caliboso law firm from representing Castle & Cooke Properties, Inc., in the subject proceeding as well. Movants rely on HAR § 6-61-13 and Rules 1.11 and 1.12 of the HRPC as their bases for disqualifying the Yamamoto Caliboso law firm.

Movants reason that the Yamamoto Caliboso law firm's representation of Castle & Cooke Properties, Inc., in this proceeding will give rise to an appearance of impropriety, constitute a conflict of interest, and taint the subject proceeding.

Citing to Rules 1.11 and 1.12 of the HRPC, Movants assert that the Yamamoto Caliboso law firm did not appropriately and timely screen Mr. Caliboso from "any participation in the matter," nor did it provide prompt written notice to the

commission in order to enable the commission to "ascertain compliance with" the applicable provisions of Rules 1.11 and 1.12 of the HRPC. Friends of Lanai also asserts that confidential information Mr. Caliboso "secured" while he chaired the commission is now imputed to the Yamamoto Caliboso law firm, to Castle & Cooke Properties, Inc.'s benefit.

With respect to its motion to disqualify, Friends of Lanai ultimately states that it "will defer to the Commission's determination in this matter."<sup>10</sup>

Castle & Cooke Properties, Inc., opposes the motions to disqualify, asserting that: (1) the rules of professional conduct provide a framework to govern an attorney's conduct, are not law, do not directly govern the commission's practices and procedures, and do not directly establish any legal rights outside the context of attorney disciplinary proceedings; (2) Movants do not have the requisite standing to seek the enforcement of the HRPC before the commission; (3) Mr. Caliboso's representation of Castle & Cooke Properties, Inc., in the subject proceeding did not violate Rules 1.11 or 1.12 of the HRPC; and (4) the Yamamoto Caliboso law firm's representation of Castle & Cooke Properties, Inc., is in compliance with Rules 1.11 and 1.12 of the HRPC.

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<sup>10</sup>Friends of Lanai's Motion to Disqualify, filed on October 2, 2013, at 1 n.1.

Castle & Cooke Properties, Inc., further asserts that Friends of Lanai fails to identify any confidential information which Mr. Caliboso received while in public service about a party to the current proceeding, whose interests are adverse to Castle & Cooke Properties, Inc., and which could be used to the party's material disadvantage in the current proceeding.

Castle & Cooke Properties, Inc., in support of its opposition, reasons that the disqualification of the Yamamoto Caliboso law firm is unnecessary. Mr. Caliboso has voluntarily recused himself from the subject proceeding, and the law firm's screening of Mr. Caliboso from any participation herein and the receipt of any attorneys' fees thereto, appropriately addressed any potential conflict of interest on behalf of either Mr. Caliboso or the law firm.

Castle & Cooke Properties, Inc., also asserts that because all of the conduct at issue herein occurred before January 1, 2014, the 2014 version of the HRPC has no relevance herein.

The Consumer Advocate, meanwhile, suggests that "the interpretation of the relevant provisions controlling this matter may be more appropriately addressed in a ruling by the

Office of Disciplinary Counsel and/or the State of Hawaii Ethics Commission."<sup>11</sup>

Here, Mr. Caliboso filed his notice of appearance of counsel on July 22, 2013, and his voluntary recusal on August 22, 2013. The commission, thus, focuses its review on the 2013 version of Rules 1.11 and 1.12 of the HRPC.

In the commission's view, the dispositive issues are: (1) whether Mr. Caliboso is a "disqualified lawyer," as that phrase is utilized in the 2013 version of Rule 1.11 and 1.12 of the HRPC; and (2) if so, whether his disqualification must also be imputed to the Yamamoto Caliboso law firm, pursuant to the 2013 version of the same HRPC.

Here, Mr. Caliboso voluntarily recused himself from representing Castle & Cooke Properties, Inc., in this proceeding, effective from August 22, 2013, subject to his representation that he "will be screened from any participation in this matter and will be apportioned no part of the fee therefrom, as provided in HRPC 1.11(a)."<sup>12</sup> Accordingly, the commission did not disqualify Mr. Caliboso from

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<sup>11</sup>Consumer Advocate's Response to Friends of Lanai's Motion to Disqualify, filed on October 4, 2013, at 2; and Consumer Advocate's Response to Kaulana Kaho'ohalahala and Matthew Mano's Motion to Disqualify, filed on October 8, 2013, at 2.

<sup>12</sup>Letter from Mr. Caliboso to Chair Morita, dated August 22, 2013, at 2.

representing Castle & Cooke Properties, Inc., in this proceeding. Moreover, there is no evidence that the Disciplinary Board of the Hawaii Supreme Court has rendered a ruling which disqualifies Mr. Caliboso from representing Castle & Cooke Properties, Inc., in the subject proceeding.<sup>13</sup>

Given these circumstances, the commission finds and concludes that, at this time:

1. Mr. Caliboso does not appear to constitute a "disqualified lawyer," as that phrase is utilized in the 2013 version of Rule 1.11 and 1.12 of the HRPC.

2. Because Mr. Caliboso is not a "disqualified lawyer," there is no disqualification that is imputed to the Yamamoto Caliboso law firm under the 2013 version of Rules 1.11 and 1.12 of the HRPC.

3. The Yamamoto Caliboso law firm, thus, appears qualified to act as counsel for Castle & Cooke Properties, Inc., in this proceeding, consistent with HAR § 6-61-13.

Based on the foregoing reasons, the commission, at this time, denies without prejudice the motions to disqualify the Yamamoto Caliboso law firm. That said, the commission notes that pursuant to HAR § 6-61-13(b), the commission reserves the right "at any time" to determine the Yamamoto Caliboso

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<sup>13</sup>See generally Rules of the Disciplinary Board of the Hawaii Supreme Court.



law firm's qualification to act as counsel for Castle & Cooke Properties, Inc., in the subject proceeding.

Of particular note, in the event the commission receives evidence that the Disciplinary Board of the Hawaii Supreme Court has issued a ruling which disqualifies Mr. Caliboso, the commission intends to re-visit the issue of whether the Yamamoto Caliboso law firm, by virtue of imputation, should be disqualified as well. In this regard, Paragraph No. 6 of the Scope to the 2013 version of the HRPC suggests that "[t]he rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."<sup>14</sup>

The commission, at this juncture, declines to impose the remedy of denying Castle & Cooke Properties, Inc., the opportunity to retain its counsel of choice in this proceeding.

As a final matter, the commission notes that any concern over the lack of an objective and impartial proceeding in the event that the commission declines to disqualify the Yamamoto Caliboso law firm is without merit. To date,

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<sup>14</sup>HRPC, Scope, Paragraph No. 6, at HRPC-3. The commission, in turn, construes "disciplinary agencies" as referring to the Office of Disciplinary Counsel, the Disciplinary Board of the Hawaii Supreme Court, and ultimately, the Hawaii Supreme Court. See generally Rules of the Disciplinary Board of the Hawaii Supreme Court.

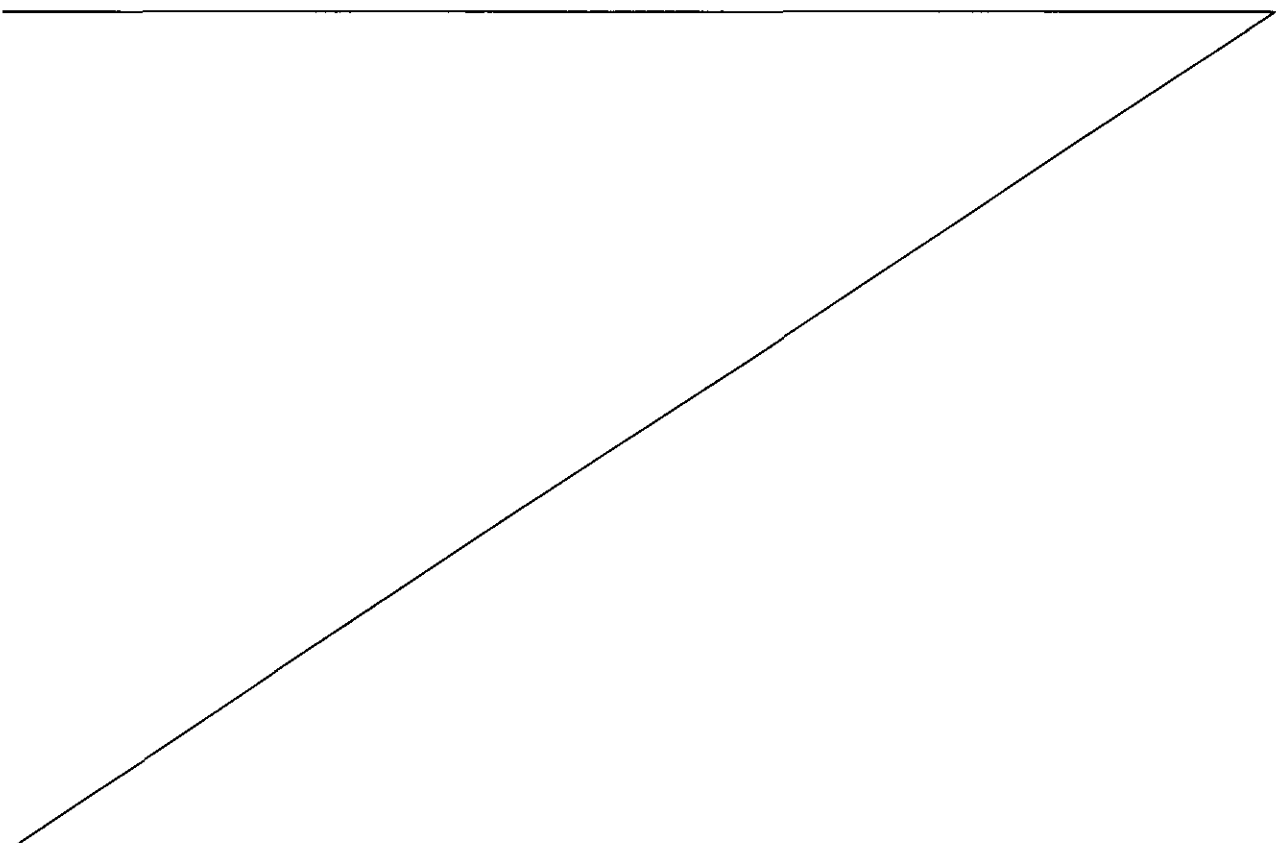
the commission has granted intervention to all interested persons that have timely moved to intervene.

III.

Orders

THE COMMISSION ORDERS:

1. Friends of Lanai's motion to disqualify the Yamamoto Caliboso law firm from representing Castle & Cooke Properties, Inc., in the subject proceeding, filed on October 2, 2013, is denied without prejudice.



2. Kaulana Kaho'ohalahala and Matthew Mano's motion to disqualify the Yamamoto Caliboso law firm from representing Castle & Cooke Properties, Inc., in the subject proceeding, filed on October 4, 2013, is denied without prejudice.

DONE at Honolulu, Hawaii DEC 31 2013.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Hermina Morita  
Hermina Morita, Chair

By Michael E. Champley  
Michael E. Champley, Commissioner

By Lorraine H. Akiba  
Lorraine H. Akiba, Commissioner

APPROVED AS TO FORM:

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2013-0168.do

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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